ORDER OF THE PRESIDENT OF THE FOURTH CHAMBER OF THE COURT OF FIRST INSTANCE

22 February 2005 *

In Case T-383/03,

Hynix Semiconductor Inc., established in Kyoungi-Do (Korea), represented by M. Bronckers, Y. van Gerven, A. Gutermuth and A. Desmedt, lawyers, with an address for service in Luxembourg,

applicant,

supported by

Citibank, NA Seoul Branch (Korea), established in Seoul (Korea), represented by F. Petillion, lawyer,

and by

Korean Exchange Bank, established in Seoul, represented by J. Bourgeois, lawyer,

interveners,

* Language of the case: English.

Council of the European Union, represented by M. Bishop, acting as Agent, assisted by G. Berrisch, lawyer,

defendant,

supported by

Commission of the European Communities, represented by T. Scharf and K. Talabér-Ricz, acting as Agents, with an address for service in Luxembourg,

by

Infineon Technologies AG, established in Munich (Germany), represented by M. Schütte, S. Cisnal de Ugarte and B. Montejo, lawyers,

and by

Micron Europe Ltd, established in Berkshire (United Kingdom),

and

Micron Technology Italia Srl, established in Avezzano (Italy),

represented by B. O'Connor, solicitor, and D. Luff, lawyer,

interveners,

APPLICATION for the annulment of Council Regulation (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea (OJ 2003 L 212, p. 1),

THE PRESIDENT OF THE FOURTH CHAMBER OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Procedure

1 By application lodged at the Registry of the Court of First Instance on 14 November 2003, Hynix Semiconductor Inc. (hereinafter 'Hynix'), a company governed by Korean law established in Kyoungi-Do (Korea), brought an action for the annulment

of Council Regulation (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea (OJ 2003 L 212, p. 1; hereinafter 'the contested regulation'). Hynix claims that the contested regulation should be annulled in its entirety or, in the alternative, partially.

2 By letters received at the Registry of the Court of First Instance on 28 January, 16 February and 11 March 2004 respectively, Micron Europe Ltd, a company governed by English law established in Berkshire (United Kingdom), and Micron Technology Italia, Srl, a company governed by Italian law established in Avezzano (Italy) (hereinafter together referred to as 'Micron'), the Commission, and Infineon Technologies AG (hereinafter 'Infineon'), a company governed by German law established in Munich (Germany), applied for leave to intervene in the case in support of the form of order sought by the Council.

3 By letters received at the Court Registry on 11 March 2004, Citibank, NA Seoul Branch (Korea) (hereinafter 'Citibank'), a company governed by Korean law established in Seoul (Korea), and Korean Exchange Bank (hereinafter 'KEB'), a company governed by Korean law established in Seoul, applied for leave to intervene in the case in support of the form of order sought by Hynix.

4 Those applications to intervene were served on the parties, who submitted written observations.

5 By separate documents received at the Court Registry on 13, 14 April and 19 May 2004, Hynix requested that certain secret or confidential documents and information be omitted from the copy of the application instituting proceedings to be sent to Infineon, Micron, Citibank and KEB, should they be granted leave to intervene in the case. It produced a non-confidential version of that pleading.

6 The Council lodged its defence at the Court Registry on 1 June 2004.

7 By orders of 14 July 2004 the President of the Fourth Chamber granted the applications of the Commission, Infineon and Micron to intervene, and reserved the decision on the merits of the requests for confidential treatment of the application instituting proceedings in relation to Infineon and Micron.

8 By letter received at the Court Registry on 15 July 2004, Hynix requested that certain secret or confidential documents and information be omitted from the copy of the defence sent to Infineon, Micron and, should they be granted leave to intervene in the case, Citibank and KEB. It produced a non-confidential version of that pleading. The President reserved the decision on the merits of this request.

9 By letters received at the Court Registry on 16 September 2004, Infineon and Micron submitted written observations on Hynix's requests for confidential treatment, within the period which had been granted to them for that purpose.

10 By letter received at the Court Registry on 21 September 2004, Hynix informed the Court that, while it had requested confidential treatment of Annex B 3 to the defence, it failed to remove the confidential version of that document from the non-confidential version of the defence produced by it on 15 July 2004, a copy of which was sent to Infineon and Micron. Hynix requested that Infineon and Micron be ordered to return that document to the Court, pending the decision to be taken on the merits of its application for confidential treatment. The President granted that request.

11 By letter received at the Court Registry on 11 October 2004, the Council requested that Annexes B 3, B 15, B 18, B 26, B 27 and B 38 to the defence be accorded confidential treatment in relation to Infineon, Micron and, should they be granted leave to intervene in the case, Citibank and KEB. The President reserved the decision on the merits of this application.

12 By the same letter, the Council also requested the Court to order Infineon and Micron to return the documents in question — copies of which had been sent to them in the absence of a prior request for confidential treatment on its or Hynix's part — pending the decision to be taken on the substance of its application for confidential treatment. The President granted that request.

13 By order of 29 October 2004, the President granted Citibank's and KEB's applications to intervene and reserved the decision on the merits of the requests for confidential treatment of the pleadings in relation to them.

14 By letters received at the Court Registry on 25 and 28 October 2004, Infineon and Micron submitted written observations on the Council's application for confidential treatment.

15 Citibank did not submit written observations on the applications for confidential treatment.

16 KEB submitted written observations limited to some of the documents covered by the Council's application for confidential treatment.

The applications for confidential treatment

17 Article 116(2) of the Rules of Procedure of the Court of First Instance provides, in its first sentence, that an intervener is to receive a copy of every document served on the parties and, in its second sentence, that the President may, however, on application by one of the parties, omit secret or confidential documents.

18 This provision lays down the principle that interveners are to receive a copy of every pleading served on the parties, and permits only by way of derogation that certain secret or confidential documents or information not be sent to them (orders of the Court of First Instance in Case T-30/89 *Hilti* v *Commission* [1990] ECR II-163, publication by extracts, paragraph 10, and of the President of the First Chamber of the Court of First Instance of 5 August 2003 in Case T-168/01 *Glaxo Wellcome* v *Commission*, not published in the ECR, paragraph 34).

19 In the present case it is appropriate to examine separately whether, first, Hynix's application for confidential treatment and, second, the Council's application for confidential treatment, permit derogation from that principle.

Hynix's application for confidential treatment

Subject-matter of, and grounds for, the application

20 Hynix requests that certain documents and information included in the application instituting proceedings and in the defence be omitted from the copies of the pleadings to be sent to Infineon, Micron, Citibank and KEB.

21 The documents and information covered by its application for confidential treatment are as follows:

[Omissis]

Observations of the interveners

22 Infineon contests the application for confidential treatment in its entirety.

23 First, it states that this application does not contain a generic description of the majority of the documents and information covered and therefore does not enable it to determine whether their confidential treatment is justified, when a proportion thereof could be important in connection with certain of the 17 pleas in law put forward by Hynix and necessary in order for Infineon to exercise its rights. That would be so as regards the following information for which confidential treatment is requested:

[Omissis]

24 Second, Infineon maintains that this application fails to comply with the requirement to state reasons which is laid down by point VIII.3 of the Practice Directions (OJ 2002 L 87, p. 48) in that, while describing the content of the documents and of the information covered, it fails, for the most part, to explain the reasons which are to lead to their being classified as secret or confidential. That would be so as regards the following information for which confidential treatment is requested:

[Omissis]

25 Third, Infineon maintains that the fact that the Commission treated some of the documents and information covered by the application for confidential treatment as confidential during the administrative procedure and the fact that an agreement between the applicant for confidential treatment and a person not party to the dispute stipulates that some of that information is to be treated as confidential do not in themselves justify the omission of those documents and that information from the copies of the pleadings that are sent to the interveners. Infineon declares that it is willing to undertake not to disclose those documents and that information and not to use them for purposes other than those of the proceedings. Confidential treatment would therefore not necessarily be justified for:

[Omissis]

26 Fourth, Infineon submits that some of the information covered by the application is historic and/or obsolete and that other information is available to the public or to specialist circles. It would therefore appear unjustified to accord confidential treatment to:

[Omissis]

27 Fifth, Infineon submits that point VIII.2 of the Practice Directions provides that an application for confidential treatment must be strictly limited to material which is genuinely confidential and may only exceptionally extend to the entirety of an annexed document. It doubts in particular that the request for confidential treatment of the whole of Annex LII to the application instituting proceedings and of the whole of Annexes B 30 and B 31 to the defence is justified.

28 Sixth, Infineon states that Annex XXXVIII to the application instituting proceedings contains the confidential version of the response of the Korean authorities to a

questionnaire sent by the Commission during the administrative procedure, that this document was not disclosed to the parties to that procedure by the Commission and that it seems to have been given to Hynix by the Korean authorities themselves. Infineon contests the omission of that confidential version from the set of documents disclosed to it and its replacement by a non-confidential version. It takes the view that, should the document contain secret or confidential information, it must in any event be sent a complete copy by virtue of the principle of equality of arms.

29 Seventh, Infineon essentially expresses doubts as to whether secrecy or confidentiality attaches to:

[Omissis]

30 Micron limits its objections to Annex B 3 to the defence. It submits that this document is of particular importance in the context of the plea relating to the lack of cooperation which Hynix is claimed by the Council to have displayed and to the possibility which that institution had of relying on the available facts and data, and in the context of the pleas relating to the characterisation of the existence of a financial contribution by the public authorities and to the calculation of the amount of the subsidies. It therefore doubts that the request concerning it can be granted in its entirety.

Findings of the President

31 First, the party who makes an application for confidentiality has the task of specifying the documents or information covered and of duly stating the reasons for which they are confidential (order of the President of the First Chamber, Extended

Composition, of the Court of First Instance of 8 November 2000 in *Tirrenia di Navigazione and Others* v *Commission*, not published in the ECR, paragraph 20, and order in *Glaxo Wellcome* v *Commission*, cited in paragraph 18 above, paragraphs 36 and 37). The Instructions to the Registrar of the Court of First Instance (OJ 1994 L 78, p. 32), as last amended (OJ 2002 L 160, p. 1), repeat those requirements in the first subparagraph of Article 5(4), as do the Practice Directions in point VIII.3.

32 In the present instance, the application meets the requirement to specify confidential material, except in so far as it relates to Annexes XII, XXII, XXVII, XXXV, XXXVIII, XXXIX, XL and XLI to the application instituting proceedings. For those documents, it does not at any time specify the information requested to be omitted from the copies to be sent to the interveners. Furthermore, in the non-confidential version of that pleading which has been sent to the interveners, a significant part of the information in question has been deleted without those deletions being indicated in any way. The interveners are therefore not in a position to identify the information and, a fortiori, to put forward their observations on its confidentiality or the need that might exist for it to be disclosed to them.

33 However, individual examination of those documents shows that the information in question, of which there is a considerable amount, falls into two categories. The first contains secret or confidential information mentioned elsewhere in the pleadings, for which Hynix has requested confidential treatment, and information that is strictly of the same nature. The second comprises information which is not in any event secret or confidential. In these very particular circumstances it is appropriate, on grounds of procedural economy, to rule straightaway on the request relating to those documents. However, account will necessarily have to be taken of the imprecise nature of the request relating to those documents and of the global and brief nature of the reasons given for it.

34 The requirement to state reasons is to be assessed in light of the nature of each of the documents and pieces of information covered. Indeed, it is apparent from the case-law that a distinction may be drawn between, first, information which is by nature secret, such as business secrets of a commercial, competition-related,

financial or accounting nature (see, to this effect, the orders of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance of 26 February 1996 in Case T-395/94 *Atlantic Container Line and Others* v *Commission*, not published in the ECR, paragraph 4, of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance of 6 February 1997 in Case T-322/94 *Union Carbide* v *Commission*, not published in the ECR, paragraph 24, of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance of 4 March 1997 in Case T-234/95 *DSG* v *Commission*, not published in the ECR, paragraph 15, and of the President of the Fifth Chamber of the Court of First Instance of 23 April 2001 in Case T-77/00 *Esat Telecommunications* v *Commission*, not published in the ECR, paragraph 84), or confidential, such as purely internal information (orders of the President of the Second Chamber of the Court of First Instance of 21 March 1994 in Case T-24/93 *Compagnie maritime belge transports and Compagnie maritime belge* v *Commission*, not published in the ECR, paragraph 12, and of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance of 25 June 1997 in Case T-215/95 *Telecom Italia* v *Commission*, not published in the ECR, paragraph 18), and, second, other documents or information which may be secret or confidential, for a reason that is for the applicant to furnish (see, to this effect, the order of the Court of First Instance of 13 November 1996 in Case T-14/96 *BAI* v *Commission*, not published in the ECR, paragraph 14, and the order in *Esat Telecommunications* v *Commission*, cited above, paragraphs 27, 45, 50, 80 and 87).

35 In the present instance, individual examination of the information in respect of which Infineon maintains that reasons are not stated in the application shows that such information consists entirely of figures or of specific elements of a commercial, competition-related or financial nature which it is sufficient, in order to satisfy the requirement to state reasons, to describe briefly, indicating as appropriate whether they are secret or confidential, as Hynix has done.

36 Second, when a party makes an application under the second sentence of Article 116 (2) of the Rules of Procedure, the President is to give a decision solely on the documents and information the confidentiality of which is disputed (orders of the President of the Third Chamber of the Court of First Instance of 15 October 2002 in Case T-203/01 *Michelin* v *Commission*, not published in the ECR, paragraph 10, and of 5 February 2003 in Case T-287/01 *Bioelettrica* v *Commission*, not published in the ECR, paragraph 12). [Omissis]

37 In the present instance, Infineon's objections relate to the whole of the application for confidential treatment including, albeit with an expression of doubt, Annexes XXIX (pp. 625 and 626), XXXI and XXXV to the application instituting proceedings, Annexes B 3 and B 36 to the defence and certain recent information in Annexes XII, XIII (pp. 347 and 348), XVII (p. 429), XVIII (p. 433), XXII and XXIX (pp. 622 and 623) to the application instituting proceedings. It is therefore necessary to give a decision on all the documents and information referred to.

38 Third, in so far as an application made under the second sentence of Article 116(2) of the Rules of Procedure is disputed, the President has the task first of all of examining whether the documents and information whose confidentiality is disputed are secret or confidential.

39 In this examination, the President cannot be bound by a confidentiality agreement which the applicant for confidential treatment may have concluded with a person not party to the dispute relating to documents or information that concern that person and are included in the pleadings (order of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance in Case T-102/96 *Gencor* v *Commission* [1997] ECR II-879, paragraphs 17 to 19). In the present case, it is therefore not necessary to request Hynix to produce the confidentiality agreements on which it relies in support of its application.

40 Nor can the President be bound by the fact that certain documents and information were accorded confidential treatment by the Commission during the administrative procedure which has led to the adoption of the contested act. On the contrary, he has the task of examining whether the document or information in question is in fact secret or confidential (see, to this effect, the order in *Gencor* v *Commission*, cited in paragraph 39 above, paragraph 67, the order of the President of the Second Chamber of the Court of First Instance of 8 June 1998 in Case T-22/97 *Kesko Oy* v *Commission*, not published in the ECR, paragraph 14, the order of the President of the Fifth Chamber of the Court of First Instance of 2 March 1999 in Case T-65/98 *Van den Bergh Foods* v *Commission*, not published in the ECR, paragraph 27, and the order in *Tirrenia di Navigazione and Others* v *Commission*, cited in paragraph 31 above, paragraph 23).

41 None the less, in proceedings concerning an act adopted under Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1) it may prove relevant to take account of the fact that, in the course of the administrative procedure which has led to the adoption of that act, the institutions, after receiving an application for which good cause was shown, agreed to treat documents or information produced by a party as confidential or as provided on a confidential basis, pursuant to Article 29 of that regulation.

42 Fourth and finally, where his examination leads him to conclude that some of the documents and information whose confidentiality is disputed are secret or confidential, the President is then to assess and weigh up the competing interests, for each document and piece of information.

43 In this connection, the assessment of the circumstances in which use may be made of the derogation provided for by the second sentence of Article 116(2) of the Rules of Procedure differs according to whether confidential treatment is requested in the interests of the applicant for confidential treatment or in the interests of a person not party to the dispute.

44 Where confidential treatment is requested in the interests of the applicant, this assessment leads the President to weigh in the balance, for each document or piece of information, the applicant's legitimate concern to prevent serious harm to his interests and the equally legitimate concern of the interveners that they should have the information necessary for exercising their procedural rights (orders in *Hilti* v *Commission*, cited in paragraph 18 above, paragraph 11, and *Glaxo Wellcome* v *Commission*, cited in paragraph 18 above, paragraph 35).

45 Where confidential treatment is requested in the interests of a person not party to the dispute, this assessment leads the President to weigh in the balance, for each document or piece of information, the interest of that person that the secret or

confidential documents or information which concern him should be protected and the interest of the interveners in having them for the purpose of exercising their procedural rights (orders in *Gencor* v *Commission*, cited in paragraph 39 above, paragraph 18, and *Glaxo Wellcome* v *Commission*, cited in paragraph 18 above, paragraph 50).

46 In any event, an applicant for confidential treatment must, given the adversarial and public nature of the judicial proceedings, envisage the possibility that some of the secret or confidential documents or information which he has decided to place on the file appear necessary for the exercise of the interveners' procedural rights and, consequently, must be disclosed to them (order of the Court of First Instance in Case T-89/96 *British Steel* v *Commission* [1997] ECR II-835, paragraph 24; see also, to this effect, the order of the President of the Second Chamber of the Court of First Instance of 2 June 1992 in Case T-57/91 NALOO v *Commission*, not published in the ECR, paragraph 16).

47 Finally, it is irrelevant that an intervener, as in the present instance, suggests undertaking not to disclose the documents or information whose omission is requested from the copies of the pleadings to be sent to him, and to use them solely for the purposes of his intervention. The parties and interveners in proceedings are in any event to use the pleadings of which copies are sent to them solely for the purpose of exercising their respective procedural rights (judgment of the Court of First Instance in Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 137, and order in *Glaxo Wellcome* v *Commission*, cited in paragraph 18 above, paragraph 28).

48 It is in light of those principles that Hynix's application should be examined, while reserving special treatment for Annexes XII, XXII, XXVII, XXXV, XXXVIII, XXXIX, XL and XLI to the application instituting proceedings given the findings in paragraph 32 above.

— The request relating to documents and information other than Annexes XII, XXII, XXVII, XXXV, XXXVIII, XXXIX, XL and XLI to the application instituting proceedings

49 As a first point, it is settled case-law that when the same information is reproduced a number of times in the pleadings and a party neglects to request that each of the passages in which it appears be treated confidentially, so that that information will in any event be disclosed to the interveners, the request concerning it can only be refused (orders of the President of the Second Chamber, Extended Composition, of the Court of First Instance of 9 November 1994 in Case T-9/93 *Schöller Lebensmittel* v *Commission*, not published in the ECR, paragraph 11, of the President of the Fourth Chamber of the Court of First Instance of 16 September 1998 in Case T-252/97 *Dürbeck* v *Commission*, not published in the ECR, paragraph 13, and in *Van den Bergh Foods* v *Commission*, cited in paragraph 40 above, paragraph 21), given that it is pointless.

50 In the present instance, that is the case with regard to a significant amount of information that is covered by the request and contained in the pleadings themselves. That information comprises:

[Omissis]

51 The request relating to that information can therefore only be refused.

52 With regard to the remainder of the application, it is to be noted (i) that the application instituting proceedings, the 63 documents annexed thereto, the defence and the 38 documents annexed to the defence comprise more than 4 000 pages and (ii) that Hynix requests confidential treatment for a very large amount of information.

53 In such circumstances it is not possible to examine systematically whether each piece of information covered by the application is mentioned in the pleadings in places other than those set out by the applicant. Consequently, it must be understood that the confidential treatment accorded to certain information will have effect only in so far as it does not turn out subsequently that information treated in that way is repeated in passages of the pleadings disclosed to the interveners.

54 As a second point, individual examination of the documents and information other than those mentioned in paragraph 50 above shows that some are neither secret nor confidential.

55 That is the case, first, with information that concerns the interveners and is necessarily known to them (order in *Compagnie maritime belge transports and Compagnie maritime belge* v *Commission*, cited in paragraph 34 above, paragraphs 13 and 14). Here, that applies:

[Omissis]

56 Second, that is the case with information which is available, if not to the public at large, at least to specialist circles (orders in *Compagnie maritime belge transports and Compagnie maritime belge* v *Commission*, cited in paragraph 34 above, paragraph 14, *British Steel* v *Commission*, cited in paragraph 46 above, paragraph 26, and *Glaxo Wellcome* v *Commission*, cited in paragraph 18 above, paragraph 43). Here, that is true of the information for which confidential treatment is requested in paragraph 322 and footnote 269 of the application instituting proceedings. That information contains statements of Standard & Poor's relating to its decision to lower Hynix's credit rating in October 2001, which are by their nature intended to be brought to the knowledge of investors interested by such a decision.

57 Third, that is the case with information of which the interveners are already or may already become aware legitimately (orders in *Telecom Italia* v *Commission*, cited in paragraph 34 above, paragraph 19, and *Glaxo Wellcome* v *Commission*, cited in paragraph 18 above, paragraph 45) and information which is largely apparent, or may be deduced, from information of which they are aware or which will be disclosed to them (order in *DSG* v *Commission*, cited in paragraph 34 above, paragraph 14, order of the President of the Second Chamber, Extended Composition, of the Court of First Instance of 3 July 1998 in Case T-143/96 *Volkswagen and Volkswagen Sachsen* v *Commission*, not published in the ECR, paragraphs 20 and 32, and order in *Glaxo Wellcome* v *Commission*, cited in paragraph 18 above, paragraph 45). Here, that applies to:

[Omissis]

58 On the other hand, Annex B 3 to the defence cannot be regarded as legitimately brought to the knowledge of Infineon and Micron inasmuch as Hynix, which requested confidential treatment for it from the outset, was reasonably quick in claiming that its disclosure to the interveners resulted from a clerical error on its part and in requesting that they be ordered to return it to the Court.

59 Fourth, that is the case with information that is not sufficiently specific or precise to be secret or confidential (see, to this effect, the orders of the Court of First Instance of 10 February 1995 in Case T-154/94 *CSF and CSMSE* v *Commission*, not published in the ECR, paragraph 32, of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance of 26 February 1996 in Case T-322/94 *Union Carbide* v *Commission*, not published in the ECR, paragraph 34, and in *Gencor* v *Commission*, cited in paragraph 39 above, paragraph 40). Here, that is true of the following information for which confidential treatment is requested:

[Omissis]

60 Fifth, that is the case with information which has been secret or confidential but is five or more years old and must therefore be treated as historic unless, by way of exception, the applicant demonstrates that, despite their age, those data still constitute essential elements of its commercial position or of that of the third person concerned (order in *Glaxo Wellcome* v *Commission*, cited in paragraph 18 above, paragraph 39; see also, to this effect, the order of the President of the Court of First Instance of 16 July 1997 in Case T-126/96 *BFM* v *Commission*, not published in the ECR, paragraph 25). In the present case, the following are to be treated as historic:

[Omissis]

61 The request relating to the information listed in paragraphs 55 to 57, 59 and 60 above must therefore be refused.

62 As a third point, individual examination of the documents and information other than those listed in those paragraphs shows that they are all either secret or confidential.

63 That is the case, first, with certain figures and technical information relating to the business policy and competitive position of the applicant or of the third party whom they concern. In so far as such figures and information are specific, precise and recent, they are by nature business secrets (orders in *Hilti* v *Commission*, cited in paragraph 18 above, paragraph 20, and *Atlantic Container Lines and Others* v *Commission*, cited in paragraph 34 above, paragraph 4). Here, this is true of:

[Omissis]

64 That is the case, second, with certain figures and technical information relating to the applicant's financial position or to commitments entered into by it in this connection with persons not party to the dispute. In so far as such figures and information are specific, precise and recent, they are by nature business secrets (see, to this effect, the order of the President of the Third Chamber, Extended Composition, of the Court of First Instance of 20 October 1994 in Case T-170/94 *Shanghai Bicycle* v *Council*, not published in the ECR, paragraph 11, the order in *Union Carbide* v *Commission*, cited in paragraph 59 above, paragraphs 29 and 30, and the order in *DSG* v *Commission*, cited in paragraph 34 above, paragraph 15). Here, this is true of:

[Omissis]

65 That is the case, third, with other documents or information the reasons for whose confidentiality in the present instance have been duly explained by the applicant.

66 This is true of Annex LII to the application instituting proceedings, examination of which leads to the conclusion that this document, which contains the Abbie Gregg report, must exceptionally be regarded as confidential in its entirety inasmuch as, in particular, it is an indivisible body of specific, precise and recent commercial information constituting Hynix business secrets by nature, and of assessments made regarding those business secrets by the authors of the report on a confidential basis.

67 It is also true of Annexes B 19 and B 31 to the defence, examination of which leads to the conclusion that those documents, which contain the proposal for the recapitalisation of Hynix presented by Salomon Smith Barney Inc. in April 2001 and the report written by it in September 2001, must exceptionally be regarded as confidential in their entirety inasmuch as, in particular, they are devoted to highly confidential strategic and financial arrangements envisaged to cover the period 2001/2005.

68 It is true finally of Annex B 30 to the defence. This document, which contains the Monitor Group report relating to Hynix's business, financial and competitive strategy, also appears in the file as Annex 3 to Annex XXXV to the application instituting proceedings. Pages 471 to 476 are of a confidential nature except, in the case of Infineon and of Micron, the information respectively concerning them at pages 474 and 475.

69 For its part, Annex B 3 to the defence, for which confidentiality is asserted by both parties, will be examined in the context of the Council's application for confidential treatment (see paragraphs 84 to 89 below).

70 As a fourth and final point, it is apparent on weighing up the competing interests that, of the secret or confidential information referred to in paragraphs 63 to 68 above, only the information mentioned in footnotes 186 and 284 of the application instituting proceedings appears necessary for the exercise of the interveners' procedural rights. If the interveners were not aware of these figures, they would discuss in vain the pleas relating to the calculation of the amount of the advantages to which the figures relate.

71 The request relating to that information must accordingly be refused.

72 On the other hand, none of the other secret or confidential information at issue appears necessary for the exercise of the interveners' procedural rights having regard in particular to the syntheses thereof given in the parties' pleadings and to the other information on the file. Furthermore, disclosure of some of this information to third parties could prove prejudicial to Hynix. That is true in particular of the documents attached as Annex LII to the application instituting proceedings and as Annexes B 19 and B 31 to the defence.

73 The request relating to that information can accordingly be granted.

— The request relating to Annexes XII, XXII, XXVII, XXXV, XXXVIII, XXXIX, XL and XLI to the application instituting proceedings

74 As pointed out in paragraphs 32 and 33 above, the request relating to these documents is imprecise and the reasons given for it are both global and extremely brief.

75 Individual examination of these documents, which cannot disregard those circumstances, shows that, of the substantial amount of information for which confidential treatment is requested, some is neither secret nor confidential, because it concerns the interveners and is necessarily known to them, because it is available to the public at large or to specialist circles, because it is largely apparent, or may be deduced, from information of which the interveners are already aware or which will be disclosed to them, because it is not sufficiently specific or precise, because it may be regarded as historic (see paragraphs 55 to 57, 59 and 60 above), or because it is such as to keep the interveners in doubt as to the strategic decisions adopted or to be adopted by Hynix and not to reveal the content thereof to them (order in *British Steel* v *Commission*, cited in paragraph 46 above, paragraph 31).

76 On the other hand, the following are secret or confidential, because they constitute precise, specific and recent data of a commercial, competition-related or financial nature:

[Omissis]

77 The request relating to information other than that listed in the preceding paragraph must accordingly be refused.

78 It appears on weighing up the competing interests that the secret or confidential information listed in paragraph 76 is not necessary for the exercise of the interveners' procedural rights.

79 Infineon is wrong in its assertion that it would be contrary to the principle of equality of arms for it to be sent a copy of the non-confidential version of Annex XXXVIII to the application instituting proceedings when Hynix has the confidential version. Since the secret or confidential information set out in this document does not appear necessary for the exercise of the interveners' procedural rights, it can as such be omitted from the copies of the pleadings sent to the interveners, and it does not in any way matter whether the author of the document in question has decided, as he was free to do, to send a copy of the document to one of the parties to the dispute, and to that party alone.

80 The request relating to that information can accordingly be granted.

The Council's application for confidential treatment

Subject-matter of, and grounds for, the application

81 The Council requests that Annexes B 3, B 15, B 18, B 26, B 27 and B 38 to the defence be omitted in their entirety from the copies of the pleadings sent to Infineon, Micron, Citibank and KEB. In support of its application, it submits in

particular that Annex B 3 contains confidential information provided to the Commission during the administrative procedure by Hynix and by some of the banks which granted the measures classified as subsidies in the contested regulation. It also states that the annexes other than Annex B 3 contain documents whose submission by the Council was authorised by their respective authors subject to the condition that they be disclosed only to Hynix and the Commission.

Observations of the interveners

82 Only Micron and KEB express objections to the application. Micron's objections relate to Annex B 3 to the defence. KEB's objections are presented as limited to the documents and information concerning KEB's actions in relation to Hynix and to the Korean authorities.

Findings of the President

83 The President has the task of giving a decision solely on the documents and information whose confidentiality, pleaded by one party, is disputed by the other party or by an intervener (see paragraph 36 above).

84 First, Annex B 3 to the defence, for which confidential treatment is requested by both Hynix and the Council, contains a mission report drafted by Commission staff following verification visits to Hynix, to certain bodies which participated in the measures classified as subsidies in the contested regulation and to the Korean authorities, conducted in Korea from 2 to 12 December 2002, pursuant to Articles 11 and 26 of Regulation No 2026/97. The bodies in question are Korea Deposit

Insurance Corp., Korea Export Insurance Corp., the Financial Supervisory Commission and the Financial Supervisory Service, KEB, Korea Development Bank, Woori Bank and Chohung Bank.

85 It is apparent on reading this mission report, which preceded the contested regulation and was preparatory thereto, that it sets out exchanges of views that took place between the Commission staff who conducted the verification visits in question and the third parties whom the visits concerned, relating to the substantial amount of information provided by those third parties. Individual examination of the information in question, which the Commission staff undertook, in light of the valid grounds relied on by the parties concerned, to treat as provided on a confidential basis under Article 29 of Regulation No 2026/97, shows that it is in fact all secret or confidential. It also shows that the information is presented in a manner indivisibly linked to the exchanges of views concerning it.

86 It is to be concluded therefrom that, subject to the special position of KEB, this document not only contains an indivisible body of information that is secret or confidential for Hynix or for various persons not party to the dispute (see, to this effect, the order of the President of the Second Chamber of the Court of First Instance of 31 March 1992 in Case T-57/91 *NALOO* v *Commission*, not published in the ECR, paragraph 10), but also constitutes a working document, internal to the Commission. A document of that kind cannot be revealed to the applicant itself, save where the exceptional circumstances of the case concerned so require, on the basis of solid evidence which it is up to him to provide (order of the Court of Justice in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11, and judgment of the Court of First Instance in Case T-132/01 *Euroalliages and Others* v *Commission* [2003] ECR II-2359, paragraph 94), unless, and in so far as, the institution which is its author decides otherwise. Here, it is apparent from the Council's application, which is not disputed in this regard, that the Commission intended to lift the confidentiality of this document vis-à-vis Hynix, and Hynix alone.

87 It appears on weighing up the competing interests that, subject to the special position of KEB, disclosure of this document is not necessary for the exercise of the interveners' procedural rights having regard to, in particular, the grounds of the

contested regulation, the pleas debated by the parties, the use made by them of the document in their pleadings and the syntheses which other material in the file provides concerning the questions touched on in the document.

88 KEB's situation, on the other hand, is special. A section of the mission report is devoted to the meeting on 5 December 2002 between the Commission and KEB's representatives, and to the documents supplied by the latter on that occasion (paragraphs 77 to 131 of the mission report). Inasmuch as this section sets out factual information that concerns KEB and is therefore necessarily known to it, it must be concluded that the section is not secret or confidential in relation to KEB (see paragraph 55 above). Inasmuch as this section sets out exchanges of views, which are of a confidential nature, regarding KEB's actions in relation to Hynix and to the Korean authorities, it may be concluded, after weighing up the competing interests, that disclosure of the section is necessary in order for KEB to exercise its rights and, in particular, is necessary for its discussion of the pleas relating to the characterisation of a financial contribution by the Korean authorities, which is one of the central issues of the dispute.

89 The request relating to Annex B 3 to the defence can, therefore, be granted, with the exception, in the case of KEB, of paragraphs 77 to 131 of the mission report, which will have to be disclosed to it.

90 Second, examination of Annex B 15 to the defence (agreement concluded between the Korea Credit Guarantee Fund and the creditor financial institutions' council for Hynix, to which KEB belonged) and Annex B 18 thereto (a document presented as having been supplied by KEB to the Commission during the administrative procedure) leads to the conclusion that these documents concern KEB and are not secret or confidential in its regard (see paragraph 55 above).

91 The request relating to these documents must accordingly be refused.

92 Third, examination of Annexes B 26, B 27 and B 38 to the defence reveals that these documents do not concern KEB and are thus not covered by its objections. The request relating to them is consequently not contested by any of the interveners. There is accordingly no need to give a decision on it.

93 Finally, formal note is taken of the declarations in writing of Infineon and Micron that they have not retained a copy of the confidential versions of the annexes to the defence which were disclosed to them by reason of Hynix's clerical error and of the time taken by the Council to submit its application for confidential treatment.

On those grounds,

THE PRESIDENT OF THE FOURTH CHAMBER
OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **There is no need to give a decision on the request for confidential treatment of Annexes B 26, B 27 and B 38 to the defence.**

2. **The requests for confidential treatment, in relation to Citibank, NA Seoul Branch (Korea), Infineon Technologies AG, Korean Exchange Bank, and Micron Europe Ltd and Micron Technology Italia Srl, of the documents and information listed in the annex to the present order are granted.**

3. **The requests for confidential treatment are refused as to the remainder.**

4. **The non-confidential versions of the pleadings shall be produced by the party who is the author thereof and served, by the Registrar, on the interveners listed in paragraph 2 of the operative part.**

5. **Costs are reserved.**

Luxembourg, 22 February 2005.

H. Jung — Registrar

H. Legal — President